

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

U.S. DISTRICT COURT
FILED AT WHEELING, WV
AUG 13 1997
NORTHERN DISTRICT OF WV
OFFICE OF THE CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRIMINAL NO. 1:96CR43

FLOYD RAYMOND LOOKER, a/k/a RAY, and
JAMES R. ROGERS, a/k/a RICH.

Defendants.

MEMORANDUM REGARDING THE
TESTIMONY OF SPECIAL AGENT EARL ROBERTS

The Government will call Special Agent Earl Roberts, an engineer, as an expert witness. Roberts graduated with a bachelors of science degree in mechanical engineering from Cornell University in 1970. He also attended a concentrated course in construction contracts in 1985. Roberts was the Chief Engineer of the Criminal Justice Information Services Division from 1992 to 1996. He was responsible for the design and construction of the Clarksburg facility. Additional responsibilities included operation maintenance and security at the facility. Currently, Roberts is the Chief of Construction and Facilities Management Section, FBI Academy. He is responsible for planning design and construction at the FBI Academy as well as facilities management and security.

Before being the Chief Engineer for the Criminal Justice Information Service Division, Roberts was the Chief of Facilities Management Unit for the Administrative Service Division from 1987 to 1992. He was responsible for the operation and maintenance of FBI Headquarters,

space management of FBI space throughout the U.S. and the planning, design and construction of projects at FBI Headquarters and in FBI field offices. Before to that he was the Contracting Officer Technical Representative and Contacting Officer for various construction contracts for expansion and renovation of FBI field offices throughout the United States from 1984 to 1987. He has also previously testified as an expert witness in the U.S. District Court in Helena, Montana as to construction bid rigging in 1984.

He will testify to the vitality of the specific blueprints photographed and this will be used to show the defendant's motives for committing the crimes alleged. In summary, he will testify that the blueprints chosen by defendant Rogers, which were photographed and supplied to defendant Looker, were the blueprints among the hundreds of blueprints of the entire facility, which would be important and necessary to doing damage to or destroying the Criminal Justice Information Services Division complex. His testimony at issue here is admissible because it is helpful to show the jury the defendants' intent and motive to injure or destroy this facility, although that ultimate conclusion will be left to the trial jury. See statement of Earl Roberts, attached hereto as Exhibit A.

The defendant Rogers believes that the Court should use a Daubert analysis in determining the admissibility of Special Agent Roberts' testimony as an expert witness. However, the more proper analysis is under Federal Rule of Evidence 702 (Testimony by Experts).

Federal Rule of Evidence 702 provides "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Rule "is broadly interpreted, and

helpfulness to the trier of fact is its 'touchstone.'" *Kopf v. Skym*, 993 F.2d 374, 377 (4th Cir. 1993). The Advisory Committee Notes to Rule 702 state that

"[t]here is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." *Ladd, Expert Testimony*, 5 *Vad.L.Rev.* 414, 418 (1952). When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 *Wigmore* §1918.

Special Agent Roberts will be using his technical and/or specialized knowledge of the blueprints to assist the jury in determining the motives of the defendants.

Under *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court held that a trial judge faced with a proffer of expert scientific testimony must determine at the outset, pursuant to Federal Rule of Evidence 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. The Court of Appeals for the Fourth Circuit has followed the *Daubert* analysis in criminal and civil cases. *U.S. v. Dorsey*, 45 F.3d 809 (4th Cir. 1995); *U.S. v. Powers*, 59 F.3d 1460 (4th Cir. 1995); *U.S. v. Bynum*, 3 F.3d 769 (4th Cir. 1993).

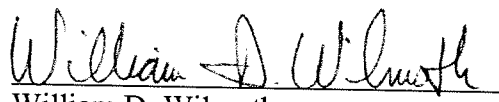
However, the *Daubert* analysis is confined to the evaluation of 'scientific' expert testimony. *Thorton v. Caterpillar*, 951 F.Supp. 575 (D.S.C. 1997). The Supreme Court in *Daubert* explained that "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here." *Daubert* at 590, n. 8. The Supreme Court did hold that "the Federal Rules of Evidence--especially 702--do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert* at 598.

In *Thorton*, Judge Anderson held that "*Daubert* is not applicable, nor was it intended to

apply, to experts testifying in the field of technical or other specialized knowledge. Engineers can be classified as possessing either technical or other specialized knowledge but by definition they can never be legitimately classified as scientists." Thorton at 577. Additionally, the Court held that "Daubert has no other application for use in the expert field of engineering, as well as the fields of general medical issues, real estate or other types of technical subjects or those requiring specialized knowledge." Thorton at 577. The Court cited Iacobelli Const., Inc. v. County of Monroe, 32 F.3d 19 (2d Cir. 1994) in support for its conclusion. In Iacobelli Const., the Court of Appeals for the Second Circuit held that the district court erred in applying Daubert to an expert on construction site conditions, contract document and project results because such testimony is not scientific.

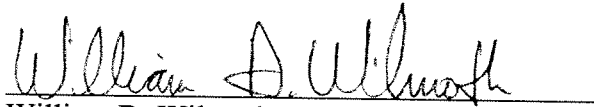
The Fourth Circuit has held that "testimony from an expert is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror." Kopf at 377. Special Agent Roberts' knowledge, skill, experience, training, and education should qualify him as an expert witness as to the blueprints of the Criminal Justice Information Services facility of the Federal Bureau of Investigation and to the importance of the specific blueprints photographed and provided.

Respectfully submitted,


William D. Wilmoth
United States Attorney

CERTIFICATE OF SERVICE

I, William D. Wilmoth, United States Attorney for the Northern District of West Virginia, do hereby certify that a copy of the foregoing MEMORANDUM REGARDING THE TESTIMONY OF SPECIAL AGENT EARL ROBERTS was hand-delivered to William Cipriani and William Gallagher and was mailed to Gary Zimmerman this Mr. Gary B. Zimmerman, Esq., at Suite 304, 100 Ross Street, Pittsburgh, PA 15219, this 13th day of August, 1997.

A handwritten signature in cursive script, reading "William D. Wilmoth", is written over a horizontal line.

William D. Wilmoth
United States Attorney

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FEDERAL BUREAU OF INVESTIGATION

Date of transcription 4/30/96

On February 22, 1996, Supervisory Special Agent (SSA) EARL G. ROBERTS, Chief Engineer, Criminal Justice Information Services (CJIS) Division, met with Special Agents (SAs) J.C. RAFFETY and LESLIE D. HOPPEY of the Clarksburg Resident Agency and Supervisory Senior Resident Agent WELLS L. MORRISON, III, Pittsburgh Division. Also present during the meeting was SSA DAVID R. LOESCH, Section Chief, Resources Management Section, CJIS.

The purpose of the meeting was to review and discuss photographs that SAs RAFFETY and HOPPEY obtained of what appeared to be various construction blueprints. SA RAFFETY provided SSA ROBERTS with a 9" X 12" plain manila envelope which contained 1 - 8 1/2" x 11" and 1 - 11" X 17" and 35 4" X 6" photographs of various construction blueprints. A preliminary review of these photographs indicated that all of the photographs were of construction blueprints for the Federal Bureau of Investigation's CJIS Facility in Clarksburg, West Virginia. These blueprints showed the overall plan of the West Virginia site (i.e., the location of the various buildings, roadways and parking lots), as well as specific details concerning buried underground utilities and a general view of the inside of Building 3, the Computer Center. It was also noted that some of the 4" X 6" photographs appeared to be sections of blueprints that, when pieced together with several other photographs, would yield a complete construction drawing.

A detailed review of these photographs and comparison of these with the CJIS Facility's construction drawings reflect the following:

4" X 6" Photo #

Relation to construction drawings

1.

Lower left corner of drawing C-1 providing definitions or meaning of various drawing symbols.

Investigation on 2/22/96 at Clarksburg, WVFile # 266A-PG-62251by SSA Earl G. Roberts/dmlDate dictated 4/16/96

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2. Upper left corner of drawing C-1 providing definitions or meaning of various drawing symbols.
3. Upper right corner of drawing C-1 providing a vicinity map showing the location of the CJIS site relative to major roadways and cities.
4. Lower right corner drawing C-1
Title block of drawing C-1.
5. Lower right corner of drawing C-2 providing definitions of abbreviations used on the drawings.
6. Drawing C-3 providing an overall site description showing locations of roads, buildings and major utility lines.
7. Upper left corner of drawing C-3A showing critical activity location on the west and central portions of the site. A critical activity is one which has a direct effect on the project schedule and is therefore designated as a milestone of project activity.
8. Lower right corner of drawing C-3A showing critical activity location on the eastern portion of the site.
9. Lower corner of drawing C-3A showing critical activity location on southern (Barnets Run) portion of the site.
10. Drawing C-4 showing an overall site map which has been

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- divided into individual work areas.
11. Lower right corner of drawing C-58 entitled, "Underground Utility Area 1," showing location of underground utilities west of West Security Station.
12. Upper left corner of drawing C-58 showing underground utilities at the West Site boundary.
13. Center portion of drawing C-58 showing underground utilities around the West Security Station.
14. Portion of the right side of Drawing C-58 showing underground utilities east of the West Security Station.
15. Lower right corner of drawing C-65 entitled, "Underground Utilities Area 8," showing underground utilities south and east of the Central Plant.
16. Central portion of drawing C-65 showing the Central Plant and its relation to the surrounding underground utilities.
17. Upper left corner of drawing C-65 showing underground utilities north and west of the Central Plant.
18. Lower left corner drawing C-65 showing underground utilities west and south of the Central Plant.

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19. Lower right corner of drawing C-113, entitled, "Electrical Sections and Details."
20. Upper left corner of drawing C-83 showing underground utilities at the property line at Barnets Run.
21. Upper right corner of drawing C-83 showing underground utilities north of the property line at Barnets Run.
22. Lower right corner of drawing C-83 entitled, "Utility Trunk Line Area 30."
23. Lower corner of drawing S3-2-2, entitled, "Building Number 3, Building Elevation."
24. Lower left corner of drawing C-113 (photo #19) showing typical sections of power and communications underground lines.
25. Upper right corner of drawing C-113 showing typical sections of power and communications underground lines.
26. Upper left corner of drawing C-113 showing typical sections of power and communications underground lines.
27. Detail 2 of drawing S3-2-7 showing a sectional view of stairwell #4 into Building 3 indicating how the stairwell is constructed.
28. Detail 1 of drawing S3-2-7 showing an elevation of stairwell #4 into Building 3

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indicating how the stairwell is constructed.

29.

Upper portion of drawing S3-2-2 (photo #23) showing an elevation of Building 3 depicting basic structure and locations of mechanical and electrical penetrations.

30.

Lower portion of drawing S3-2-2 showing an elevation of Building 3 depicting basic structure and locations of mechanical and electrical penetrations.

31.

Lower right corner of bid package #2 drawing M3-2-5 showing typical manhole detail for underground chilled water storage tank.

32.

Upper center portion of drawing M3-2-5 showing a longitudinal detail of the installation of the underground chilled water storage tank.

33.

Upper right corner of drawing M3-2-5 showing an elevation of the end of the underground chilled water storage tank.

34.

Lower right corner of drawing M3-2-5 entitled, "Building #3 Chilled Water Storage Details."

35.

Lower left corner of drawing M3-2-5 showing piping installation details and baffling for the underground chilled water storage tank.

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The 8 1/2" X 11" and 11" X 17" photographs provided are both of drawing C-3 which provides an overall view of the site showing the locations of buildings, roadways and major utility lines.

All of the photographs provided show specific information concerning the CJIS Facility. The photographs supplied describe 12 of the over 1,650 construction drawings printed for this project. They were taken from at least two different bid packages and involve civil, structural and mechanical drawings. Within a given bid package, drawings are grouped or separated by discipline (e.g. structural). The number of CJIS construction drawings, the grouping of drawings by bid package and within bid packages by discipline, all indicate that the construction drawings photographed were carefully selected to convey specific information. The drawings photographed provide the general location and layout of the CJIS Facility, specific details concerning the location and construction of various underground utilities and specific details concerning the construction of the underground Computer Center.

Some of the photographs provided appear to be taken to add definition or explanation to other photographs. For example, photograph #10 provides a map of the site showing the grid that the site has been divided into for the installation underground utilities. Photograph #s 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, and 22 provide specific underground utilities information for three of the areas delineated by the work area grid shown on photograph #10. Photograph #s 19, 24, 25 and 26 provide specific construction details for the power and communications utilities shown in these three areas.